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RE: CERCLA Financial Assurances: Colorado Division of Reclamation Mining and Safety's Position Regarding Preemption; Suggestions for Drafting the Upcoming Rule

Dear Mr. Berlow,

Colorado's Division of Reclamation Mining and Safety ("DRMS") appreciates the opportunity to provide preliminary input regarding EPA's forthcoming financial assurance rule for hardrock mining. DRMS administers a robust regulatory program under Colorado's Mined Land Reclamation Act ("MLRA") (C.R.S. § 34-32-101 et. seq.). The MLRA minimizes the adverse impacts of hardrock mining in Colorado by requiring every operator to obtain a permit and adhere to rigorous reclamation standards, both during and after the mining activity. Many of the MLRA's reclamation standards are designed to prevent the release of hazardous substances into the environment. Each operator must submit a financial warranty sufficient to assure compliance with applicable reclamation standards, as incorporated in the operation's reclamation permit. *See* C.R.S. §34-32-117.

Financial warranties are essential to DRMS's ability to effectively regulate hardrock mining in Colorado. DRMS understands that EPA is in the process of developing its own financial assurance requirements for hardrock mining facilities. EPA's entry into this field raises important questions related to preemption. This letter explains DRMS's position that MLRA financial warranties can co-exist with CERCLA financial assurance requirements, and are not the type of financial assurances that require preemption. It also provides suggestions intended to help EPA satisfy its rulemaking mandate, address important policy issues, and avoid unintended negative consequences for state programs such as Colorado's.[1] Although this letter is specific to Colorado, DRMS believes that it provides viable nationwide solutions to the difficult questions raised by EPA's upcoming rulemaking.

[1] David Berry, Director of the Colorado Office of Reclamation Mining and Safety, provided letters to EPA on October 8 and November 15, 2010, which explain certain technical details of Colorado's regulatory program. This letter builds upon Mr. Berry's letters in some respects.

THE PREEMPTION ISSUE

CERCLA directs EPA to "promulgate requirements that classes of facilities … establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b). This rulemaking directive raises important preemption questions related to § 114(d), which states that owners or operators of facilities subject to CERCLA financial responsibility requirements "shall not be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such facility." 42 U.S.C. § 9614(d).

In order to understand the preemption question, we must analyze CERCLA using the same rules of construction employed by the courts. When courts consider a question of statutory construction, their foremost goal is to effectuate the intent of Congress. To determine intent, courts first examine the plain language of a statutory provision, with the presumption that Congress "says what it means" and "means what it says." *See Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992). Courts interpret statutes so as to give meaning to every word, avoiding interpretations that render any language superfluous. *See Montclair v. Randall*, 107 U.S. 147, 152 (1883) (holding that "[I]t is the duty of the court to give effect, if possible, to every clause and word of a statute"); *Astoria Federal Savings and Loan Ass'n v. Solimino,* 501 U.S. 104, 112 (1991) (holding that statutes are to be construed, where possible "so as to avoid rendering superfluous any parts thereof"). Courts analyze specific provisions in light of the language and design of the statute as a whole, because "meaning, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *See also United states v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850) (holding that courts should not focus solely on "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

When we examine the "plain language" of § 114(d), it is clear Congress intended that CERCLA financial assurance requirements would preempt only those state financial assurance requirements that are connected with *liability* for the release of a hazardous substance. As instructed by the *Montclair* and *Astoria* cases, we cannot gloss over the term "liability." By referring to liability, Congress ensured that the provision would not broadly prohibit states from imposing financial assurance requirements in connection with the release of hazardous substances, but would only prohibit state financial assurances that are specifically connected to liability.[2] With the presumption that Congress meant what it said, we must avoid interpreting § 114(d) in such a manner that renders the term liability meaningless.

[2] It is important to note the incredibly broad definitions of the terms "release" and "hazardous substance." CERCLA defines "release" as including any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment…" *See* 42 U.S.C. § 9601(11). CERCLA defines "hazardous substance" as including substances designated by CERCLA § 102, CWA § 311(b)(2)(a) and 307(a), RCRA § 3001, CAA § 112, and TSCA § 7. *See* 42 U.S.C. § 9601(14). Over 800 different substances fall within the definition of a CERCLA hazardous substance. *See* http://www.epa.gov/oem/content/hazsubs/cercsubs.htm. If we were to ignore the term "liability," the practical result would likely be the preemption of all state financial assurance requirements related to hardrock mining.

It is also important to examine § 114(d)'s plain language within the broader context of the statute. CERCLA's fundamental statements of policy regarding its relationship to other law dictate a narrow interpretation of its preemption provisions. Section 114(a), instructs that CERCLA "shall not be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Section 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to the releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). The Tenth Circuit has held that, in these two statements of policy, "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993). Free-standing and contextual analysis of § 114(d) indicates that Congress intended to preempt only those state financial assurances that are connected to liability.

Having established that Congress intended to preempt only state financial assurances in connection with liability, we must now determine what it means for a financial responsibility requirement to be "in connection with liability" in the context of CERCLA. CERCLA's liability scheme is retroactive. It allows the federal government and other parties to recover certain cleanup costs from potentially responsible parties ("PRPs") associated with facilities from which there has been a release, or a threatened release which causes the incurrence of response costs. *See* 42 U.S.C. § 9607(a). CERCLA also authorizes EPA to order PRPs to perform certain remedial actions, subject to severe damages and fines if the order is not obeyed. *See* 42 U.S.C. § 9606. Unlike regulatory statutes such as RCRA or Colorado's MLRA, which proscribe standards for planning and operational practices, CERCLA does not impose liability until a release or a threatened release causes someone to incur response costs. Accordingly, CERCLA § 114(d) preempts only those state financial assurances connected with an operator's ability to pay for response costs caused by the release of a hazardous substance.

A court has been called upon to consider § 114(d) preemption on only one occasion. In *Chemclene v. Commonwealth of Pennsylvania*, the Pennsylvania Commonwealth Court held that federal financial assurance requirements did not preempt state financial assurance requirements that were related to hazardous substances but were not connected to an operator's ability to pay for response costs. *Chemclene v. Commonwealth of Pennsylvania*, 497 A.2d 268 (Pa. Commw. 1985). In *Chemclene*, a group of motor carriers claimed that bonds required under the Pennsylvania Solid Waste Management Act ("SWMA") were preempted by CERCLA § 114(d) because motor carriers were also subject to federal financial assurance requirements implemented by the U.S. Department of Transportation ("DOT") pursuant to CERCLA § 108(b)(5).[3] The *Chemclene* court denied the preemption claim, reasoning that:

[3] CERCLA § 108(b)(5) provides that financial assurance requirements for "motor carriers" be set by the Motor Carrier Act of 1980. Financial assurance requirements under the Motor Carrier Act were implemented by DOT through regulations discussed in greater detail below.

> *The term 'financial responsibility' as used in Section 114(d) of CERCLA contemplates an insurance program designed to pay the costs of cleaning up accidental spills of hazardous waste or hazardous materials and the claims resulting therefrom. In contrast, the bond required by Section 505(e) of the SWMA is a compliance bond. Its purpose is to insure the performance by a transporter of hazardous waste of all the obligations imposed by the SWMA, rules and regulations promulgated by DER, and the terms and conditions of the license; it is not intended to cover costs incurred by an accidental discharge of hazardous waste.*

Chemclene, at 272. The *Chemclene* case demonstrates that federal financial assurance requirements do not prohibit states from using financial assurances as a regulatory tool related to hazardous substances, so long as those financial assurances are not in connection with an operator's ability to pay for response costs.

Colorado's financial warranties do not address an operator's ability to pay for response costs. They assure compliance with reclamation requirements. In this respect, MLRA financial warranties are directly analogous to the "compliance bonds" at issue in *Chemclene*. Under the MLRA, reclamation must be conducted, both during and after the mining operation, in accordance with a reclamation plan that meets certain performance standards. Many of those standards are designed to prevent releases of hazardous substances and prevent adverse impacts on surrounding properties. *See* C.R.S. § 34-32-116 (requiring measures to minimize disturbance to the hydrologic balance, protect outside areas from damage, and control erosion and attendant air and water pollution). MLRA financial warranties assure that DRMS can complete reclamation according to those standards if the operator is unwilling or unable. C.R.S. § 34-32-117(1).

The MLRA addresses response to emergency releases via a mechanism completely separate from financial warranties. *See* C.R.S. § 34-32-122(b)(3) (describing a cash fund for release response, funded by grants, donations, and appropriations). MLRA financial warranties are a vital part of a regulatory program designed to prevent the release of hazardous substances, but they do not assure an operator's ability to pay for potential response costs. Accordingly, DRMS does not believe that MLRA financial warranties will be preempted by EPA's upcoming financial assurances rule.

FINANCIAL ASSURANCE RULEMAKING

Throughout its correspondence with the states, EPA has indicated that it hopes to fulfill its rulemaking mandate in the most direct and efficient manner possible. To that end, DRMS suggests that the upcoming rulemaking addresses only those requirements necessary to assure that operators of hardrock mining facilities demonstrate their ability to pay for response costs. DRMS believes that this strategy is not only the most direct and efficient way of satisfying EPA's rulemaking mandate, but is also the most effective solution to avoid unintended negative consequences for the states. Like Colorado, most other states use financial assurances to secure reclamation obligations.[4] By focusing on operators' ability to pay for response costs, EPA can

[4] DRMS is aware of only one state, South Dakota, which requires financial assurances in connection with an operator's ability to pay for response costs.

fill a discrete gap, complement existing state programs, and provide an additional layer of protection for the taxpayer.

EPA's § 108(b) mandate is to create a program whereby operators provide "insurance" against potential response costs. Section 108(b) financial assurances are not intended to assure compliance with regulatory requirements or operational practices; they are intended to protect the Superfund, and ultimately federal taxpayers, from incurring response costs. Congress has directed EPA to consult sources of information that will be helpful in developing an insurance model rule.[5] *See* 42 U.S.C. § 9608(b)(2) (instructing EPA to consider "the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction"). Consistent with the insurance concept, Congress provided that parties may assert claims directly against financial warrantors if there is no financially-viable PRP. *See* 42 U.S.C. § 9608(c)(2). Elsewhere in § 108, Congress made direct reference to liability coverage, requiring operators of vessels to submit financial assurances "to cover the liability prescribed…" and "to cover such liabilities recognized by law." 42 U.S.C. §9608(a). Each of these factors indicates that Congress intended for § 108 financial assurances to serve as an insurance policy rather than to ensure compliance with an undefined set of regulatory requirements or operational practices.[6] It would be a mistake to borrow financial assurance models from regulatory contexts such as RCRA and lose sight of the ultimate objective of § 108 financial assurances.

An insurance model rule is not only the most appropriate means of accomplishing EPA's statutory directive - it also allows EPA to avoid costly facility-by-facility analysis. Regulatory financial assurances require enormous expertise, and must be established by fact-intensive case-by-case review.[7] In contrast, insurance model financial assurances can be accomplished using industry-wide risk data that may already be available from the various sources that Congress has instructed EPA to consider. The financial responsibility requirements for motor carriers implemented by DOT (as delegated by CERCLA § 108(b)(5)) provide a helpful example. DOT has promulgated implementing regulations that define "financial responsibility" as financial reserves (e.g., insurance policies or surety bonds) sufficient to cover public liability." 49 C.F.R. § 387.5. DOT regulations explain that "public liability" includes, among other things:

> e*nvironmental restoration restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary*

[5] Congress did not direct EPA to consider sources of information that would be helpful to develop a regulatory model of financial assurances similar to RCRA or the MLRA. DRMS believes that this provides a significant indication of Congress's intent, as well as a pragmatic reason to align the rulemaking with these sources of helpful information.

[6] The *Chemclene* Court also characterized CERCLA § 108(b) financial assurances as an "insurance program." *Chemclene* at 272.

[7] DRMS calculates the financial warranties that secure MLRA reclamation requirements by developing and aggregating task-by-task costs estimates using current reference materials as well as the significant regional expertise of its staff. Applicants may submit initial estimates; however, those estimates must be subjected to a rigorous review. DRMS is also charged with continuously ensuring the adequacy of financial warranties using the same methods.

measure taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

49 C.F.R. § 387.5. The minimum levels of financial assurances required to satisfy public liability are documented in a schedule that references the type of carriage and the commodity transported. 49 C.F.R. 387.9; *See also* http://www.fmcsa.dot.gov/forms/print/MCS-90.htm (containing links to online forms and guidance). Hardrock mining is clearly more complicated than transportation of hazardous substances via motor carrier. Nonetheless, the DOT example demonstrates that insurance model financial assurances can be established using industry-wide data and effectively implemented without costly case-by-case review.

An insurance model rule addresses the fundamental problems that have raised the public profile of CERCLA financial assurances in recent years. The federal court for the Northern District of California cited two significant Government Accountability Office ("GAO") reports in its order directing EPA to publish the notice that led to the upcoming rulemaking. *See Sierra Club v. Johnson,* 2009 WL 482248, 6 (N.D. Cal. 2009). In each report, the GAO criticized EPA's failure to adopt CERCLA financial assurance requirements, stating that, "as a result of EPA's inaction, the federal treasury continues to be exposed to potentially enormous cleanup costs…" *US GAO, Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, GAO-05-658 (Aug. 2005). The GAO explained that, in the absence of financial assurance requirements, businesses can limit or avoid responsibility for liabilities by organizing or restructuring in ways that limit their ability to pay for cleanups or by filing for bankruptcy. *US GAO, Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public*, GAO-06-900T (Jun. 2006). An insurance model rule prevents operators from avoiding liability by specifically addressing an operator's ability to pay response costs. DRMS encourages EPA to focus on the fundamental issues raised in the GAO reports by adopting a targeted rule, rather than adopt overly-broad requirements that produce less overall benefit by unintentionally undercutting states' ability to implement existing regulatory programs.

In addition to sound legal and fiscal rationale, there are important federalism justifications for an insurance model rule. The standing Executive Order on federalism directs federal agencies to consult with and defer to states where possible when formulating policies that will have "substantial direct effects on the states." 64 Fed. Reg. 43255, 43256 (1999). The Order further instructs federal agencies to avoid action that "limits the policymaking discretion of the states except where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." *Id*. DRMS appreciates EPA's ongoing effort to request and consider the states' input on the upcoming rulemaking. While there can be no doubt that CERCLA financial assurances will address a problem of national significance, the statutory directive does not contemplate a rule that would overlap with state regulatory programs like the MLRA.[8] A targeted insurance model rule allows

[8] President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on May 20, 2009, strongly discouraging federal actions that preempt state law. http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption. Thankfully, EPA has not indicated that it intends to purposely preempt state law. Nonetheless, it is worth noting that an overly-broad federal rule could effectively disable existing state programs by creating unmanageable ambiguity and litigation burdens.

EPA to address important policy issues while avoiding action that could have negative federalism implications. In fact, such a rule would likely complement and bolster existing state regulatory programs.

SUGGESTIONS FOR DEVELOPING THE RULE

Consistent with the analysis above, DRMS submits the following suggestions for EPA to consider in developing its financial assurances rule for hardrock mining. DRMS is aware that the following suggestions may be somewhat premature at this early juncture and is happy to continue working with EPA as the issues are more fully developed.

- Include language in the preamble explaining that the rule is intended to assure that all operators are able to pay for response costs that could be incurred as the result of a release or threatened release of hazardous substance, and is not intended to prevent states from imposing financial assurance requirements related to reclamation planned and permitted as part of a permitted mining operation.
- Reference the "insurance" concept described in this letter.
- Explain the phrase "in connection with liability" by referencing response costs.
- Avoid using RCRA financial assurances as a template as they represent a regulatory approach to financial assurance.
- Avoid creating or implying standards for reclamation or operational practices.
- Reference the sources of input listed in CERCLA § 108 when developing standards for establishing levels of financial responsibility, as those sources make it clear that the rule is intended to provide insurance for response costs.

DRMS sincerely hopes that you will find this letter helpful as EPA moves forward with its rulemaking process. DRMS believes that appropriate CERCLA financial assurances can provide tremendous value to both the taxpayer and the environment. DRMS hopes that it can serve as a helpful resource as we move forward.

Sincerely,

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